Board of Alien Labor Certification Appeals

UNITED STATES DEPARTMENT OF LABOR
WASHINGTON, D.C.

'Notice: This is an electronic bench opinion which has not been verified as official'

DATE:February 24, 1997

CASE NO: 95-INA-257

In the Matter of:

COPA CABANA ICE CREAM
Employer,

On Behalf of:

ALFREDO ANDERS
Alien

Appearance: F. E. Ronzio Esq.
Los Angeles, California
for the Employer and the Alien

Before: Neusner, Holmes, and Huddleston
Administrative Law Judges

FREDERICK D. NEUSNER
Administrative Law Judge

DECISION AND ORDER

Pursuant to 20 CFR § 656.26(1991), the Employer requests review of the denial of a labor certification application by a Certifying Officer of the United States Department of Labor.[1] The Employer submitted this application on behalf of the above-named alien under authority of § 212(a) (14) of the Immigration and Nationality Act of 1990, 8 U.S.C. § 1182(a)(14)(1990).

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[1]The certification of aliens for permanent employment is governed by § 212(a)(5)(A) of the Act, 8 U.S.C. § 1182(a)(5)(A), and Title 20, Part 656 of the Code of Federal Regulations. Unless otherwise noted, all regulations cited in this decision are in Title 20. The "Act" is the Immigration and Nationality Act, as amended, 8 U.S.C. § 1182(a)(5)(A). The "Secretary" is the Secretary of Labor, U. S. Department of Labor. The "CO" is the Hon. Paul R. Nelson, Certifying Officer, U. S. Department of Labor, ETA, at San Francisco, California. The "Alien" is Alfredo Anders. The "Employer" is Copa Cabana Ice Cream. The Appeal File referred by the CO to the Office of Administrative Law judges will be cited as "AF." Note that the sequence of some of the manually imprinted AF numbers is erratic.

Procedural history. This case arose from an application for labor certification on behalf of the Alien, which Employer filed under § 212(a)(5)(A) of the Act, 8 U.S.C. § 1182(a)(5)(A), and the regulations adopted under 20 CFR, Part 656. After the CO at San Francisco denied the application on September 12, 1994, the Employer requested review pursuant to 20 CFR § 656.26. We base our decision on the record of the CO's denial of certification, the Employer's request for review, and the written argument of the parties. 20 CFR § 656.27(c).[2]

Statutory authority. § 212(a)(14) of the Act, as amended, provides that an alien seeking to enter the United States for the purpose of performing skilled or unskilled labor may receive labor certification, if the Secretary of Labor determines and certifies to the Secretary of State and the Attorney General that at the time of application for a visa and admission into the United States and at the place where the alien is to perform the work: (1) there are not sufficient workers in the United States who are able, willing, qualified, and available; and (2) the employment of the alien will not adversely affect the wages and working conditions of the United States workers similarly employed. An employer desiring to employ an alien on a permanent basis must prove that it has met the conditions of 20 CFR Part 656, the most significant of which is the Employer's diligent effort to recruit U.S. workers at the prevailing wage and under prevailing working conditions through the public employment service and by other reasonable means in order to make a good faith test of U.S. worker availability.

Application. This Employer is engaged in the manufacture of ice cream and similar frozen desserts, natural juices, and fruit salad. On September 6, 1992, the Employer applied for labor certification to enable the Alien, who is a national of Mexico now living in Los Angeles, California, to fill the position of Machine Operator, Ice Cream Machinery, at Employer's plant in Huntington Park, California. AF 61-64, 104-105.

The CO classified this position as Freezer Operator under Occupation Code No. 529.482-010 of the Dictionary of Occupational Titles, of which we take administrative notice as a record of

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[2]In this case Ramon Castillo signed the application as an officer of the Employer. Also, he personally signed most of the communications by Atty Ronzio to indicate that he concurred in any material statements of fact they contained. AF 61-66. It is well settled that assertions by Employer's attorney that are not supported by underlying statements by a person with knowledge of the facts do not constitute evidence and cannot be considered on appeal. **Modular Container Systems, Inc.**, 89-INA-228(July 16, 1991)(en banc); also see **API Industries, Inc.**, 93-INA-159(Aug. 16, 1994); **Michael S. Sausman,** 93-INA-200(Aug. 17, 1993); **E. Davis, Inc.**, 92-INA-277(Aug. 4, 1993); **Hupp Electric Motors, Inc.**, 90-INA-478(Jan. 30, 1992); **Moda Linea, Inc.**, 90-INA-424(Dec. 11, 1991).

the Employment and Training Administration, U. S. Department of Labor. AF 61. The Employer's advertisement incorporated the following as its job description in the advertisements it published in the recruitment process:

> MACHINE OPERATOR (Ice Cream Machinery) Min. 2 yrs. exp. to operate various types of ice cream making machines (Shake machine, congealation machine, freezer machine, impermeable and sealing machine) which creates analitic stimates of flavors artificially created preservatives. Salary $9.41 hr. OT: 1½ hr. if required. Job site/interviews: Huntington Park, Calif.

AF 79-81.[3] Although shorter than the DOT entry, the Employer's job description adequately states the duties of the position the Employer seeks to fill.[4]

Recruitment report. Under 20 CFR § 656.24(b)(2)(ii) the Employer bears the burden of proof to establish that the rejected applicants were not qualified, as the CO is required to consider a U.S. worker to be able and qualified for the job opportunity, if by reason of education, training, experience, or a combination of these factors the job candidate is competent to perform in the normally accepted manner the duties required in the advertised occupation as it customarily is performed by other U.S. workers similarly employed.

Notice of finding. By his NOF of June 28, 1994, the CO advised the Employer that certification would be denied on the record as it stood, subject to rebuttal on or before June 8,

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[3]The Employer required two years of experience in this job. No minimum education was required in either the application or the advertisement. AF 61.

[4]DOT ¶ 529.482-010 **FREEZER OPERATOR(dairy prod.)freezer; ice cream freezer.** Operates one or more continuous freezers and other equipment to freeze ice cream mix into semisolid consistency: Weighs or measures powder and liquid ingredients, such as color, flavoring, or fruit puree, using graduate, and dumps ingredients into flavor vat. Starts agitator to blend contents. Starts pumps and turns valves to force mix into freezer barrels, admit refrigerant into freezer coils, and inject air into mix. Starts beater, scraper, and expeller blades to mix contents with air and prevent adherence of mixture to barrel walls. Observes ammeter and pressure gage and adjust controls to obtain specified freezing temperature, air pressure, and machine speed. Fills hopper of fruit feeder with candy bits, fruit, and nuts, using scoop, or pours syrups into holder of rippling pump. Sets controls according to freezer speed to feed or ripple ingredients evenly into ice cream expelled from freezer. Opens valve to transfer contents to filling machine that pumps ice cream into cartons, cups, and cones, or molds for pies, rolls and tarts. Places novelty dies in filler head that separates flavors and forms center designs or rosettes in packaged product. Weighs package and adjusts freezer air valve or switch on filler head to obtain specified amount of product in each container. Assembles pipes, fittings, and equipment for operation, using wrench. Sprays equipment with sterilizing solution.

1994. The CO found (1) that the Employer offered the job with restrictive requirements in violation of 20 CFR § 656.21(b)(2)(i)(A), and (2) Employer's description of the Alien's work history in Form ETA 750B was incomplete. See 20 CFR § 656.21(a)(1).

(1) The CO found the requirement of two years' experience in the job offered to be restrictive. The CO explained that the Standard Vocational Preparation (SVP) that the DOT prescribed for this position is more than six months "up to and including 1 year" of training, education and/or experience. In its letter of September 7, 1993, the Employer had justified this need for preparation by explaining that,

> While some of the machines operated may be production machines, the more complicated congealation (sic) tanks and machines which performs (sic) the function of changing from a soft or fluid state to a rigid or solid state as by cooling or freezing. In order to obtain this success, the occupant must be familiar with precise temperature controls and shop mathematics that can only come with at least two years of experience. The inability of the occupant to perform the function correctly results in an inferior product and economic chaos.

AF 63, as quoted in NOF at AF 55. In view of the contradiction between the Employer's statement and the SVP criteria in the DOT, the CO required more documentation than Employer's bare assertion that two years' experience were required. The CO explained that proof that less experienced workers were not successful in performing the job duties stated in the application and the DOT position description would be acceptable. Rejecting Employer's statements to the contrary in its application and letters in support of the application, the CO concluded that the record contained no persuasive evidence that the position Employer offered is more difficult or complex than any other freezer operator position. Accordingly, Employer was directed to reduce the experience it required in the job offered to no more than one year. In the alternative, the CO instructed the Employer that it may document its requirement of two years' of experience by proving business necessity. It was instructed to establish the reasonable relationship its designated level of training bore to the duties of this position as performed in the Employer's plant by way of showing that such experience was essential to the performance of the job in a reasonable manner. **Information Industries, Inc.**, 88-INA-082(Feb. 9, 1989).

(2) The CO required the completion of the Form ETA 750B by adding all of the jobs that the Alien had held during the prior three years, including the names and addresses of employers, the names of the jobs he held, the dates he started, the dates he left, the kinds of businesses where he worked, the number of hours he worked per week, and detailed descriptions of the duties

he performed, including the use of tools, machines, or equipment. Employer was require to document this new data. AF 58.

Rebuttal. By its letter of September 1, 1994, Employer said that in the State of California operation of freezer equipment had become more complex and that after the publication of the job description in the 1977 DOT, state agencies had adopted stringent requirements for analysis of batch samples. In order to comply with these standards the worker now must be trained to eliminate foreign bacteria before preparing the sample of each batch for official analysis. It added that the worker "must be aware of the proper amounts of conservaties and colors (both artificial and natural in addition to emission in order to obtain a stabilized product.)" Employer then said the worker "would need to draw on a knowledge of calculous (sic) and other mathematical conversations (sic) needed for the utilization of a product determined in accordance with manufactures (sic) specifications." To illustrate its argument that the standards of skill for this position had increased between the initial publication of the DOT in 1977 and the levels needed at the time of the application the Employer enclosed KQC Kelco Quality standards for loss on drying, viscosity, pH, size, and microbial assay, all of which it said must meet prescribed limits as to quantity and percentage mandated by the state department of food and agriculture. AF 20-24. Employer then explained that making a bacteria free product required the worker to be familiar with the percentage requirements allowed by law, concluding,

> Any mistake in the calculous of a component in the mixing will reflect in the end product which is out of level of standards of bacteria and other aspects as established by the Department of Food and Agriculture of the State of California.

AF 14-17.

(2) Employer's rebuttal added that from September 1992 until the date the rebuttal was filed the Alien was self-employed as an ice cream vendor in Los Angeles, where the Alien had supported himself in random jobs in that area during 1991. AF 14. The rebuttal also added documentation supporting a finding that the Alien was sufficiently trained to qualify for this position.

Final Determination. In denying certification on September 12, 1994, the CO found that the Employer failed to document that the position was offered without restrictive requirements.

Rejecting as undocumented the Employer's arguments that freezer equipment became more complex and health regulation more stringent after the 1977 DOT was published, the CO observed that even if the representations were accepted,

> Nowhere on the ETA 750A did the employer state that the employee would be required to perform analytic analysis, test for bacterial levels, or use calculus; therefore, these duties cannot serve as justification for the two year experience requirement.
>
> In addition, the rebuttal's statement that the alien's degree in biology provided him the' requisite knowledge' to perform the calculus and other 'mathematical conversations,' is neither relevant nor documentation that two years of experience is required. Nowhere in the ETA 750A form did the employer specify that college education (of any sort) was required; therefore, the alien's degree neither serves to qualify him for the position nor documents that two years of experience is needed to perform the job duties.

Having concluded that the Employer had failed to document that it offered the position without restrictive requirements, the CO finally denied Employer's application for certification. AF 07.

Discussion. The object of reexamining the CO's record in this case is to determine whether or not the Employer sustained its burden of proof in support of certification. The Employer's evidence must rebut the findings of the CO in the NOF, since all unrebutted findings are deemed admitted under 20 CFR § 656.25(e). **Belha Corp.**, 88-INA-024(May 5, 1989)(en banc); and see **Our Lady of Guadalupe School**, 88-INA-313(June 2, 1989).[5]

(1) The Employer's rebuttal assertions are not supported by documentation, as the CO explained in the Final Determination. The reason, said the CO, was Employer's failure to establish the business necessity of the level of experience it demanded by proving a reasonable relationship between the level of training and the actual performance of the duties of the position in the specific context of the Employer's business. **Information Industries, Inc.**, supra. (2) Also, the Employer failed to comply with the CO's directions to provide added documented information as to the Alien's work history, a serious omission the CO found sufficient to support denial of certification. **Patterson Board of Education**, 88-INA-088(Apr. 21, 1988). As we agree that the Employer failed to rebut the findings of the CO's NOF for all of the reasons stated in the Final Determination, the CO's denial of certification must be affirmed.

Accordingly, the following order will enter.

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[5]An employer's failure to address a deficiency noted in the NOF supports denial of certification under the Act and regulations. **Reliable Mortgage Consultants**, 92-INA-321 (Aug. 4, 1993).

ORDER

The decision of the Certifying Officer denying certification under the Act and regulations is affirmed.

For the Panel:

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FREDERICK D. NEUSNER
Administrative Law Judge

NOTICE OF **OPPORTUNITY TO PETITION FOR REVIEW:** This Decision and Order will become the final decision of the Secretary unless within twenty days from the date of service a party petitions for review by the full Board. Such review is not favored and ordinarily will not be granted except (1) when full Board consideration is necessary to secure or maintain uniformity of its decisions, or (2) when the proceeding involves a question of exceptional importance. Petitions must be filed with:

Chief Docket Clerk
Office of Administrative Law Judges
Board of Alien Labor Certification Appeals
800 K Street, N.W.
Suite 400
Washington, D.C. 20001-8002

Copies of the petition must also be served on other parties and should be accompanied by a written statement setting forth the date and manner of service. The petition shall specify the basis for requesting full Board review with supporting authority, if any, and shall not exceed five double-spaced pages. Responses, if any, shall be filed within ten days of service of the petition, and shall not exceed five double-spaced pages. Upon the granting of a petition the Board may order briefs.

BALCA VOTE SHEET

Case Name: **COPA CABANA ICE CREAM (ALFREDO ANDERS)**

Case No. : 95-INA-257

PLEASE INITIAL THE APPROPRIATE BOX.

	CONCUR	DISSENT	COMMENT
Holmes			
Huddleston			

Thank you,

Judge Neusner

Date: February 3, 1997